COPY

IN THE

Supreme Court of the United States

October Term, 1961

No. 57

SAMUEL ROTH, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL ROTH
Petitioner Pro Se

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To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel Roth, hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, affirming the decision of the U. S. District Court for the Southern District of New York, which denied petitioner's motion for a review of his trial under Indictment Cr. 148-9. The substance of petitioner's motion in the District Court was the charge that the right to counsel during a criminal trial, guaranteed

him in Amendments 5 and 6 to the U. S. Constitution, was denied him, without his knowledge, during the trial itself, by reason of a conspiracy between Nicholas Atlas—whom petitioner paid to conduct his trial—and Government Attorney, George Leisure, who—working together behind the scene of the trial itself—so manipulated the exhibits as to render impossible for the jury to receive them without religious bias. For participating in this conspiracy, Mr. Atlas was rewarded by the appointment of his son to an assistant district-attorneyship in the trial-court, and, possibly, other emoluments still unknown.

The Questions Before the Court

1. Are the obvious wrongs inflicted on this petitioner to be considered by this High Court beyond repair because he has already served his sentence and paid his fine—a condition created by the lower courts with their unconscionable prolonging of every decision?

2. Under the circumstances, should not this High Court ask that Indictment Cr 148-9 be dismissed, as already suggested by Associate Justice John M. Harlan in his Minority Opinion in the Supreme Court October Term, 1957?

3. Should not the Court order that Appellant be reimbursed the five thousand dollars fine he paid at the termination of his imprisonment?

The Law

Amendment Five, U. S. Constitution

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment for indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself; *nor be deprived of life, liberty or property without due process of law*; nor shall private property be taken for public use without just compensation.

Amendment Six, U. S. Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with all the witnesses against him; to have compulsory process for obtaining witnesses in his favor; *and to have the assistance of counsel for his defense.*

A Brief Review

Indictment Cr. 148-9 was filed on July 20, 1955 in the Southern District of New York and charged Appellant in 26 counts with mailing and causing to be mailed obscene materials in violation of Sections 2 and 1461 of Title 18, U. S. Code. On January 13, 1956, Appellant was found guilty on Counts 10, 13, 17 and 24 after a 10-day trial before

District Judge, John M. Cashin and jury. Counts 12 and 25 were dismissed in the course of the trial on consent of the Government due to the fact that the persons who recognized the materials described therein were unavailable to testify. Count 26 was dismissed by the Court at the close of the government's case, after argument. Appellant was found not guilty on the rest of the 19 counts.

On Feb. 7, 1956, Appellant was sentenced to a term of five years imprisonment on each count, to run concurrently. In addition, he was fined $5,000.00 on Counts 10 and $1 on each of Counts 13, 17 and 24. The fines on the last 3 counts were remitted.

The appeal courts having upheld the conviction, Appellant applied for a reduction of sentence which district court and the appeal courts also denied.

Suspicion of Fraud and Its Discovery

About a year after Judge Cashin denied appellant's motion for a reduction of sentence, Appellant was startled to learn that the recently graduated son of Nicholas Atlas, the lawyer to whom he had entrusted his defense in court, was acting as assistant district attorney in the same court.

The preferment of that young man in the court in which he had been tried and condemned stirred a whole series of recollections in your appellant's mind. The first of these was that he had heard at least two conversations between Atlas and Leisure on the subject of a job for Atlas's son. The first of these conversations took place in Leisure's office one Friday afternoon before the trial where Appellant happened to be as the result of an order by Judge Sugarman that he be permitted to check certain government exhibits. As I remember this conversation, Atlas was reminding Leisure that his son needed work. As Atlas had once been an assistant district attorney in that court, it

might be any kind of a job in almost any office. Even if a suspicion had suggested itself, could appellant, under the circumstances, dare entertain it? The other conversation was on the same subject and was held during a brief recess in the trial itself.

For months thereafter important aspects of the trial recurred in petitioner's mind under a new light until he had to resort to the Trial Record itself. The Record was delivered to him in the prison library, and it confirmed every suspicion of conspiracy described in the opening paragraph of this appeal. Appellant had been sold like so much meat on a butcher's counter. The whole trial was a painstakingly studied collaboration between defense and prosecution, in favor of the prosecution, pointed at the net result—a jury verdict which culminated in Mr. Atlas's son becoming a United States Assistant District Attorney, and appellant becoming a federal prisoner for almost four years.

Suppose it is argued that the lawyer's son had a right to be chosen to represent the United States Government purely on his merits as the graduate of a good law-school. Would this explain why, in conducting my trial, the son's father deliberately abandoned all the accepted principles on which the defense of a book accused of obscenity is conducted?

Ordinarily this would be a difficult accusation to prove. But Atlas and Leisure overlooked the fact that five years before the case fomented by Indictment Cr. 148-9 Atlas defended this petitioner in a similar case in the same court before Judge Weinfeld. A comparison of the Record of the earlier Trial with the Record of the later one, displays, in the latter, a studied evasion of every act and responsibility which made the first trial a classic of pleading in that field.

A Few of the Differences Between the Two Trials

1. In the trial before Judge Weinfeld, Atlas refused to accept for jury duty any member of the National League of Decency whose membership is sworn to combat all public mention of sex. In the trial before Judge Cashin, he overrode appellant's objections to the juror, a member of that organization, who became Juror 13. As the Record shows, appellant had to—because of her—deny Juror 8 the right to withdraw for the bedside of an ailing relation.

2. The duty of a defense attorney in an obscenity case to have the accused book read to the jury, so that it may consider it as a whole, yielded to defendants in book cases after a long struggle, has become a universal practice in the courts of all civilized nations. In the trial before Judge Weinfeld, Atlas asked that this be done, and it was done. In the trial before Judge Cashin, the right was denied by Judge Cashin, and was not insisted on by Atlas.

3. No hostile, immaterial exhibits were allowed to enter the trial before Judge Weinfeld. In the trial before Judge Cashin, Atlas connived with the prosecution to permit the entry, as evidence, of Haldane McFall's book entitled *Aubrey Beardsley*, a book published long before your petitioner entered the publishing business. In this ill-bred, gossipy art-tome, the author describes the death of Aubrey Beardsley who wrote *Venus & Tannhauser*, the book under government attack, in 1893 a year before your petitioner was born. He is becoming a convert to Catholicism, and is pleading with some people at his bedside that all of his obscene work, an unnamed work especially, be destroyed. As the only book mentioned in context was *Under the Hill*, it became necessary to get the jury to believe that *Under the Hill* and the book under attack were one and the same. For such corroboration, Leisure turned to Atlas as if the latter were not *defense* counsel but a member of his own prosecuting staff, and asked him if this was not so, and

Atlas assured him that it was so. That there is no truth in this is attested by the great critic Arthur Symons in his work *From Toulouse-Lautrec to Rodin.* The following quote is from page 176: "He (Beardsley) was at work then, with an almost pathetic tenacity at his story, never to be finished, *Under the Hill,* a new version, a parody of the story of *Venus & Tannhauser.*

The titles of the books were read, but no publication date given. The prosecutor read how the publisher, also present at the dying young Catholic's bedside, refused to honor Beardsley's request, consigning the artist's soul to hell, without giving the name of the publisher, so creating in the jury the impression that the book condemned by its own author as obscene was the book I was accused of, and that I was the very publisher who had denied the young convert's dying wish.

All these facts and many more established, Appellant began to present them to the U. S. District Court of the Southern District of New York in a series of affidavits which asked for his freedom and the quashing of the indictment which had brought the trial into being.

The manner in which these affidavits were met both in the Trial Court and in the U. S. Appellate Court for the Second District is a study in legal disinterestedness.

The Appellant received from the Trial Court affidavits from those accused by him—all of which only added to the proof of his allegations—but he noticed with surprise that Judge Cashin, whose conduct of the Court had made the collaboration betwen defense and prosecution possible, had not disqualified himself, but was sitting in judgment on issues in which he was personally involved.

Appellant immediately wrote to the Trial Court and, separately, to the then Attorney General of the U. S., the Honorable William Rogers, that no real consideration could be given to Appellant's argument if the decision was to be made by one as closely related to the charges as Judge

Cashin. But appellant received no answer on this plea either from the Judge or from the Attorney General.

Finally—after a passage of time that rendered improbable appellant's gaining from a favorable decision, by way of a reduction of his imprisonment, Judge Cashin handed down a five-page Denial which attempted no real answer to the substance of the eight Affidavits he allowed himself to judge.

Appellant then addressed himself to the judges of The U. S. Court of Appeals for the Second Circuit. In the first of four more Affidavits he analyzed the matters of complaint which were enhanced in value rather than reduced by Judge Cashin's Denial.

Four days after appellant's discharge from Lewisburg Prison he was notified that there would be a hearing of his appeal a few days later. He immediately appeared before the judges and pleaded for time in which to hire an attorney, asking for a minimum of thirty days, and this too was summarily denied.

Appellant appeared at the hearing two days later and argued the facts of his appeal against the background of the eight Affidavits in the case before the District Court and the four submitted for their deliberation, all of which he presumed had been examined by them.

After a few more weeks of delay the Appeals Court gave a decision which it was soon to overrule. The decision said, in effect, that since petitioner was now completely free, and because he had initiated his appeal under 26 U. S. C. 2255, there was no further need to consider his complaints.

Appellant immediately replied with a new Affidavit that called the Court's attention to the fact that both of the conditions on which his petition was denied were not true of his case. Appellant did not initiate his appeal under the 2255 heading, and the Court had only to consult the Probation Department of the United States (situated

in the same building with it) to learn that he was still under government supervision.

Within another few days, the Appellate Judges rewrote their denial into the form in which it is reprinted in the APPENDIX to this Appeal.

The only possible conclusion to be drawn from both of these decisions is that the three judges of the U. S. Court of Appeals for the Second Circuit did not read the Affidavits which constituted the case for hearing before them. Had they read them, they would have had no trouble finding the heading under which Appellant initiated this action, and it could not have occurred to them, if they read it, and noticed how vital was Judge Cashin's attitude during the falsification of his trial to the issues outlined by him, to hinge their denial on the opinion of a Judge who should have disqualified himself from ruling in this case, to begin with.

These solemn facts concerning the betrayal of a defendant in an important American Court of Law—only a few of many which include evidence of post-trial tampering with an important trial exhibit—appear to justify the petition for a hearing before the jurists of this High Court.

The Writ of Certiorari should be granted, and the judgment of the U. S. Court for the Second Circuit be reversed.

Respectfully submitted,

SAMUEL ROTH
Appellant in Person

APPENDIX

I

Final Decision of the United States Court of Appeals for the Second Circuit

"In the light of the facts set forth in Roth's motion verified December 27, 1960, and the reply letter of the United States Attorney dated January 5, 1961, our order of November 23, 1960 in which we dismissed Roth's appeal on the ground of mootness, is hereby vacated."

"Coming then to the merits of Roth's present appeal, we agree with Judge Cashin that the facts set forth in the moving papers below, as distinguished from assertions of conclusion or suspicion, are insufficient to impeach the original conviction or to warrant a new trial. Accordingly, whether the motion below be deemed one brought under 28 U. S. C. 2255 or one in the nature of a writ of coram nobis, its denial by the order below is

Affirmed."

Appendix

II

Judge Cashin's Denial

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Cr. 148-9

UNITED STATES OF AMERICA

against

SAMUEL ROTH

Defendant.

MEMORANDUM

CASHIN, D. J.

This is a motion made pursuant to 28 U. S. C. §2255 for a hearing on the conviction of Samuel Roth. Roth was charged, in a 26 count indictment, with sending obscene matter through the mails. On January 13, 1956, the jury found defendant Roth guilty on four counts and he was sentenced to five years in prison and a fine of $5,000.00. This conviction was affirmed in the United States Court of Appeals for the Second Circuit and the Supreme Court of the United States. (237 F. 2d 796 (1956) and 354 U. S. 476 (1957)).

Appendix

In five separate affidavits, totaling 44 pages, defendant Roth charges everyone, even those only remotely connected with the case, with being corrupt. His first lawyer he accuses of not only "throwing" his case but of helping the prosecuting attorney. The Judge he charges with being prejudiced because he is a Catholic and also subject to pressure by Senator Kefauver. He charges Senator Kefauver with using undue influence. He charges the prosecuting attorneys with tampering and changing the exhibits in this case. His appeals lawyer is accused of getting the case by bribing another lawyer. These are just a few of the many charges made. This court has looked into them all and found not a shred of evidence to support any of the charges. Thus, defendant's motion is denied and no hearing is warranted.

The defendant's main charges are the following:—

1. His lawyer "picked" a Catholic Judge to preside over his trial;

2. His lawyer aided the United States Attorney's office by informing them of a copy of a book "Aubrey Beardsley" by Haldane McFall;

3. His lawyer failed to object to the introduction of said book;

4. His lawyer failed to insist that the entire text of the allegedly obscene materials be read to the jury;

5. His lawyer failed to challenge a woman who was a member of the Catholic Legion of Decency;

6. His lawyer refused to permit defendant Roth to take the stand;

7. His lawyer failed to object to the prejudicial summation of the prosecutor;

8. The prosecuting attorney tampered with the evidence.

Upon looking into these and other charges the court has found them baseless. To the charge that his lawyer led him before a Catholic Judge, we have his own statement on page 6 of his affidavit of March 4, 1959, that he wished to go before Judge Noonan, who is also of the Catholic religion. As an answer to the charge that his lawyer, Mr. Atlas, aided the prosecuting attorney in getting the McFall book, we have the sworn affidavits of Mr. Atlas and Mr. Leisure, the prosecuting attorney, which flatly deny the charge. Moreover, there is the affidavit of Postal Inspector William Carr, stating that he got the book out of the library and brought it to the attention of the prosecuting attorney in a letter dated June 13, 1955, which was before the indictment against Roth was filed on July 20, 1955.

Defendant also alleges that the law requires the entire text of the obscene matter be read to the jury and that his lawyer refused to demand this. Defendant does not support his contention that the entire text must be read, nor can the court find any authority for this contention.

Defendant also accuses his lawyer of not permitting him to take the stand. However, defendant had a criminal record and this would have been brought out if defendant had taken the stand. The charge that the prosecuting attorney tampered with the evidence is completely unsupported.

Defendant's charge that the prosecutor's summation was prejudicial and that his lawyer should have but did not object, is also not supported by any evidence. The Court of Appeals found that "The government's summation in the case was within the scope of the evidence". (*United States* v. *Roth*, 237 F. 2d 796, 801 (2 Cir. 1956)).

The charges that the alternate juror was a member of the Catholic Legion of Decency and that his lawyer did not object to the introduction of the McFall book are true but fall far short of showing that his lawyer threw the case or that he was incompetent. The defendant had a fair trial and the court was in no way prejudiced against him.

"There was ample evidence for the jury, and the defendant had an unusual trial in that the judge allowed him to produce experts, including a psychologist who stated that he would find nothing obscene at the present time. Also various modern novels were submitted to the jury for the sake of comparison. Very likely the jury's moderate verdict on only a few of the many counts submitted by the government and supported by the testimony of those who had been led to send their orders through the mail was because of this wide scope given the defense." (*United States* v. *Roth*, 237 F. 2d 796 (2 Cir. 1956)).

As has been stated, the defendant has made many other charges. However, to go into them all in this opinion would be unfruitful and unnecessary. It is sufficient to state that this court has looked into them all and has not found any evidence to substantiate them. Nor does the defendant offer any evidence to prove them. Genuine issues of fact, when raised in a proceeding under 28 U. S. C.

§2255, require a hearing and then findings of fact and conclusions of law. (*United States* v. *Hayman*, 342 U. S. 205 (1952)). However, this case does not present any genuine issues of fact. All the defendant presents are wild allegations with no proof to back them up. As a matter of fact, all the proof points to the conclusion that defendant had a fair trial and that his lawyer competently represented him. Under the terms of the statute a summary disposition of futile and groundless motions is allowed where "• • • the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief • • •". (28 U. S. C. §2255). This is such a case.

Defendant's motion is denied.

It is so ordered.

Dated: New York, N. Y., July 28th, 1959.

JOHN M. CASHIN
United States District Judge

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FILED
JUN 1 1961
JAMES R. BROWNING, Clerk

No. 949

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAMUEL ROTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10) is reported at 286 F. 2d 635. The opinion of the district court (Pet. App. 11-15) is not reported.

JURISDICTION

The judgment of the court of appeals was entered January 26, 1961. On April 17, 1961, Mr. Justice Harlan granted an extension of time to file a petition for a writ of certiorari to and including May 8, 1961,

and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the effective representation of counsel at his trial.

STATEMENT

In 1956, petitioner was convicted on four counts charging the sending of obscene matter through the mails and was sentenced to imprisonment for five years. His conviction was affirmed by the Court of Appeals for the Second Circuit, 237 F. 2d 796, and by this Court, 354 U.S. 476. Thereafter, petitioner applied to the district court for reduction of sentence. The denial of that application was affirmed on appeal. 255 F. 2d 440, certiorari denied, 358 U.S. 819.

Subsequently, petitioner attacked the judgment of conviction, presenting a number of affidavits in which he claimed misconduct or corruption on the part of judge, prosecutor, and defense counsel. The district judge, in his memorandum opinion, stated that he had considered the charges and found "not a shred of evidence" to support any of them. The opinion reviewed petitioner's main points and denied his motion (Pet. App. 11-15). The court of appeals affirmed, holding "that the facts set forth in the moving papers below, as distinguished from assertions of conclusion or suspicion, are insufficient to impeach the original conviction or to warrant a new trial." (Pet. App. 10).

ARGUMENT

In this Court, petitioner emphasizes his claim that he was improperly represented at his trial, alleging that his retained counsel must have colluded with the government in order to have the lawyer's son appointed an Assistant United States Attorney. The matters which petitioner claims show failure of representation are on their face reasonable decisions of trial strategy.[1] As the court below held, petitioner presented no facts "as distinguished from assertions of conclusion or suspicion" which tend to impeach the conviction which was affirmed by this Court in 1957.

[1] The McFall biography of Aubrey Beardsley to which petitioner refers (Pet. 6-7) was used because "Venus and Tannhauser," a story by Beardsley, was included in the book "American Aphrodite", which formed the basis of one count on which petitioner was convicted. A psychologist for the defense testified about Beardsley and the defense offered in evidence two books about Beardsley. The government then offered the book by McFall and used it to cross-examine another psychologist, called by the defense, who testified about Beardsley.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

JUNE 1961.

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